76-963

IN THE SUPREME COURT

OF THE UNITED STATES

UNITED STATES OF AMERICA,

v.

MILTON J. LARGENT and
JONATHAN B. HIDGON,

Petitioners.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORIARI

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SUBJECT INDEX

INDEX TO AUTHORITIES CITED

OPINIONS DELIVERED IN COURTS BELOW

No opinions below have been reported.

The Court of Appeals Opinion below is appended hereto:

December 13, 1976 Opinion of United States Court of Appeals (Sixth Circuit affirming District Court Convictions)
(C.A. Nos. 76-1285/76-1286)

A District Court Opinion is voluminous and is separately presented:

July 2, 1974 Opinion of United States District Court (E.D. Mich.) Denying Defendants' Motions to Dismiss
(D.C. No. 4-80831, E.D. Mich.)

DATE AND TIME OF ENTRY OF JUDGMENT TO BE REVIEWED

December 13, 1976. Judgment entered by United States Court of Appeals (Sixth Circuit) pursuant to Opinion of that date in Cases numbered 76-1285/76-1286

SUPREME COURT JURISDICTIONAL BASIS

28 U.S.C. §1254

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE DELAYS (1) BETWEEN THE DATE OF THE OFFENSE ALLEGED AND THE DATE OF THE INDICTMENT AND (2) BETWEEN THE DATE OF THE INDICTMENT AND THE DATE OF TRIAL, CONSTITUTED VIOLATIONS OF DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND SPEEDY TRIAL.

II. WHETHER THE COURT OF APPEALS ERRED IN FINDING CONSTITUTIONAL VALID SECTIONS 891 AND 894 OF TITLE 18, UNITED STATES CODE, UPON WHICH THE INDICTMENT IS BASED, AS APPLIED TO NON-EXTORTIONATE CREDIT TRANSACTIONS.

III. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTIONS TO EXCLUDE UNSUPPORTED TESTIMONY THAT DEFENDANTS HAD ENGAGED IN SIMILAR BUT SEPARATE ACTS OF CRIMINAL EXTORTION.

IV. WHETHER THE COURT OF APPEALS ERRED IN NOT REVERSING BECAUSE TELEPHONIC CONVERSATIONS INVOLVING THE DEFENDANTS WERE INTERCEPTED AND RECORDED WITHOUT THEIR CONSENT AND EVIDENCE OF THESE CONVERSATIONS SHOULD HAVE BEEN SUPPRESSED AS DEFENDANTS MOVED.

V. WHETHER THE COURT OF APPEALS ERRED IN NOT REVERSING THE CONDUCT OF THE GOVERNMENT TRIAL COUNSEL IN ATTEMPTING TO SHOW THAT THE DEFENDANT HIGDON ATTEMPTED TO ARRANGE THE HANGING OF A PROSECUTION WITNESS AND IN ASKING DEFENDANT HIGDON IF HE HAD HEARD A PROSECUTION WITNESS STATE THAT SHE HAD IDENTIFIED HIGDON'S PHOTOGRAPH WHEN, IN FACT, NO SUCH TESTIMONY EXISTED.

Constitutional Provisions and Statutes Involved

Fifth Admendment of the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment of the United States Constitution. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

18 United States Code §2
(62 Stat. 684; 65 Stat. 717)

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 United States Code §891
(82 Stat. 160)

"(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

"(2) The term "creditor," with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

"(3) The term "debtor," with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that

extension of credit is made to repay the same.

"(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with extension of credit.

"(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

"(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

"(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

"(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

"(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in

consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law."

18 United States Code §894
(82 Stat. 161)

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

"(1) to collect or attempt to collect any extension of credit, or

"(2) to punish any person for the nonrepayment thereof,

shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

"(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected, or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

"(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances

"described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection."

CONCISE STATEMENT OF THE CASE

("Tr." and "B Tr." refer respectively to the four volume transcript of trial and to the separately paginated one volume transcript of Phillip Wayne Berryman's trial testimony.)

On November 22, 1973, a grand jury in the Eastern District of Michigan returned a six count indictment charging that, in 1968 and 1969, Defendants, Milton J. Largent and Jonathan B. Higdon, had aided, abetted, induced, and procured the use of extortionate means to collect an extension of credit and had conspired to commit the substantive offense in violation of 18 U.S.C. 891, 894 , and 2. Defendant Largent was charged in each of the five substantive counts; Defendant Higdon was charged in two substantive counts. Both were charged in the conspiracy count.

Defendants filed Motions to Dismiss the Indictment, for an evidentiary hearing on the Motions to Dismiss, for a Bill of Particulars, for discovery and inspection. All of the above

Motions were denied by the District Judge, except the Motion for Discovery and Inspection, which was denied in part and granted in part, principally to the extent to which the United States Attorney agreed to furnish information. The Defendants had a joint jury trial commencing October 23, 1975 and running thirteen trial days.

Separately filed written Motions with the lower Court seeking the dismissal with prejudice of the indictment by reason of the claimed undue delay, unexplained by the Government, between the dates of the alleged offenses and the date of the presentment by the Government to the Grand Jury which returned the indictment, by reason of which the Defendants were claimed to have been prejudiced. Those Motions were denied.

Prior to the Government's making its opening statement to the jury, (Tr. 30), Defendants orally moved the suppression of what was later marked (Tr. 65) and received as Government Exhibit #1, a Five Inch Reel of magnetic

tape, together with a transcript prepared by the Government of Exhibit #1, identified as Government Exhibit 1-A.

Exhibit #1-A had tabs identifying by numbers 1, 2, 3, and 4 four telephone conversations. One party to each of the conversations was William R. Michael, the victim of the extortions. Mr. Michael consented to police-sanctioned recording of the conversations. No search warrant was ever sought or obtained for the recording by the police or anyone else. The other parties to each of the four conversations were each of the Defendants, a son of the Defendant Largent and Philip Wayne Berryman, one of the alleged co-conspirators.

Following the jury trial, Largent and Higdon were convicted on two substantive counts. Largent was found not guilty on three substantive counts. A mistrial was declared on the conspiracy count following the jury's inability to reach a verdict. Largent was sentenced to four years'

imprisonment on each count to be served concurrently and Higdon was sentenced to three years' imprisonment on each count to be served concurrently, both men's sentences subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2).

Defendants' alleged offenses developed from the collection of a gambling debt allegedly owed to Defendants by William R. Michael. Defendants were admittedly partners in a book-making enterprise on horse races in Detroit, Michigan, and during the early summer of 1968 Michael became one of Defendants' customers (Tr. 398-399, 402, 485-487, 562). Michael subsequently placed several bets each week on horse races pursuant to an agreement which allowed him to pay his lost bets to Defendants once each week (Tr. 229-230, 567-573, 834, 862-863). This payment arrangement continued until the autumn of 1968, when Michael lost several large bets on football games, losses which he could not afford to pay under the weekly payment agreement

and by the end of 1968, Michael owed Defendants $15,000 in unpaid bets (Tr. 231-234).

Defendants initially agreed to allow Michael an unspecified period of time to arrange payment of his gambling debt (Tr. 235, 237-238). Defendants remained in close telephone contact with Michael and made repeated demands for payment (Tr. 239-240, 597-599, 865-866), though they never threatened or physically harmed Michael or his family.

After Michael failed to pay within three months, he received a series of approximately six telephone demands for payment from several unidentified persons (Tr. 240, 244-246). When Michael did not settle his debt in response to these calls, one Phillip Wayne Berryman began trying to collect the debt. Berryman is a man who has been convicted variously of Armed Assault to Rob, Conspiracy to Rob/Unarmed, and First Degree Murder, among others, the Murder conviction later being reversed.

Berryman testified at trial as a government witness and his most cogent testimony was contradicted by both Defendants' testimony. Berryman then contacted Michael's son and asked him to furnish his father's address and telephone number. After several telephone calls in which Berryman made threats of violence, Michael's son complied (B Tr. 24-27). Berryman then initiated a series of telephone demands to Michael and the pair met on several occasions. Despite Berryman's warning that "it wasn't no game, that [Michael] was going to pay the money," Michael did not make any payments (B Tr. 28-29, 32; Tr. 246-248). The majority of these calls were received by Michael's wife, Grace, since Michael was not living at home during most of that period (Tr. 250-251, 354, 357). Berryman's calls became progressively more menacing until eventually he threatened to kill Mrs. Michael unless she revealed her husband's whereabouts (Tr. 254). When these verbal threats failed to

produce results, Berryman and three associates resorted to a series of more forceful collection techniques which included throwing a brick and a molotov cocktail through the windows of Michael's residence (B Tr. 29-30; Tr. 252, 259-261, 355-356, 372, 403-404), firing a pistol into the livingroom (B Tr. 30-31; Tr. 261-26], 528), and damaging the front yard landscaping by driving a vehicle over it (Tr. 251, 356).

As a result of this continued verbal and physical harassment, Michael sought the assistance of local police. Pursuant to police instructions, Michael arranged another meeting with Berryman for the evening of July 22, 1969, at a bar near Michael's home. Michael was accompanied to the meeting by Maurice Foltz, a local police chief who posed as Michael's friend who was responsible for a portion of the $15,000 gambling debt. Berryman, who had borrowed Appellant Higdon's car for the evening, met Michael and Foltz in Higdon's automobile outside

of the bar and accepted Michael's partial payment of $200 and made further threats. When Berryman received no further payments he responded with telephone death threats to Michael's daughter and son-in-law, to whose residence Mrs. Michael had moved for protection (B Tr. 39-41; Tr. 358, 368, 389-391, 394-396). As a result of these forceful requests from his family, Michael met Berryman at a Detroit bar in early August, 1969, and offered him two $2,500 cashiers checks. Berryman testified that after conferring with Defendant Largent, Berryman agreed to accept the checks (Tr. 291-292, 325-326). The following day, Michael delivered the $5,000 payment to Berryman at the Detroit Race Course (B Tr. 41-45; Tr. 292, 348). Berryman testified that he took the checks to Largent who paid half of the money to Berryman as his collection fee (B Tr. 45).

On August 27, 1969, Michael, who had travelled to Las Vegas, made his third payment

by sending a $4,800 Western Union money order to Geraldine McNeal, a friend of Berryman's in Detroit. Berryman and McNeal cashed the money order; Berryman testified that he gave half the proceeds to Largent and Higdon and retained the remainder pursuant to the collection fee agreement (B Tr. 45-47; Tr. 293-295, 492-494). Defendants Largent and Higdon denied ever receiving any portion of the $15,000 gambling debt. Michael testified that this was Michael's final payment since Berryman had agreed to compromise the debt for $10,000 (Tr. 349) though Berryman contradicted that statement.

On direct examination by the Government, Berryman testified over Defendants' objection, that he first collected gambling debts for Defendant Largent in "'69, part of '68," that he "was to get fifty percent of everything I collected.", (Tr. 14). He testified that he collected "Maybe a half dozen or more," debts for Largent; the smallest one was "about $875"

and the largest one "ran up to $15,000, some went over that." (Tr. 15).

Defendants had told Michael they "paid off" his football bets to a man nick-named "Kilroy," because they were not accustomed to taking football bets, especially bets of this size and did not have the capital to handle bets of that size ($15,000 on football games). (Tr. 573-4) Kilroy was later identified by his real name and it was established by a defense witness that Kilroy died sometime between 1969 and 1975 and was, therefore, not available to be called as a witness at trial in late 1975. Defendants also told Michael that they were getting pressured by Kilroy for the debt payment; that they were resisting revealing to a collector (Berryman) Michael's name and address but that Largent eventually did give Berryman Michael's name and showed Berryman where Michael lived. They told him they didn't control the collector from whose pressure Michael sought relief. Defendants testified that Berryman told them that

one Sol Shindell, a well-known, Detroit-area big bookmaker had hired Berryman to collect the debt. A defense witness, one Michael Wilcox, later verified Berryman's friendship with Sol Shindell (Tr. 800 ff). (Sol Shindell was the victim of a gangland-style murder at his home in a Detroit suburb at some time between 1969 and 1975.)

The defense witness Michael Wilcox was a lifelong friend of Appellant Higdon. He testified that while he and Berryman were in prison together, Berryman told him that he (Berryman) was an associate of Sol Shindell.

The government trial counsel then began a series of questions related to the hanging of a prisoner in Wilcox's cell. The prosecutor later told the Court that his purpose in posing the questions was to infer that Defendant Higdon had ordered his friend Wilcox to get Berryman killed, because Berryman had informed the Government that he (Berryman) had just been moved out of the "hanging" cell the day before.

On cross-examination of Defendant Higdon, the prosecutor began (Tr. 899) to inquire into Defendant Higdon's memory of the testimony of Mrs. Grace Michael, the wife of the principal alleged victim, William R. Michael, the testimony of Mrs. Grace Michael having occurred at pages 352 through 379 of the trial transcript.

On page 900 the prosecutor is noted as having asked the following question, "Did you hear her (Mrs. Michael) testify that she had picked your photograph of of a." At that point a Motion for Mistrial was made by Higdon's counsel, joined by Largent's counsel, for the reason that the testimony referred to by the prosecutor had never occurred. Despite the District Court's repeating his statement of shock and disturbance at continued prosecutorial misconduct, as had occurred on the earlier incident concerning the hanging in prison, the Court denied the Motion for Mistrial.

The basis for District Court jurisdiction was 18 U.S.C. §3231.

ARGUMENT

I. THE DELAYS (1) BETWEEN THE DATE OF THE OFFENSE ALLEGED AND THE DATE OF THE INDICTMENT AND (2) BETWEEN THE DATE OF THE INDICTMENT AND THE DATE OF TRIAL, CONSTITUTED VIOLATIONS OF DEFENDANTS' FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS AND SPEEDY TRIAL.

Dillingham v. United States, 423 U.S. 64 (1975) recently set the tone for the Federal Court application of the Sixth Amendment right to a speedy trial. It was followed by United States v. MacDonald, 531 F. 2d 196 (4th Cir., 1976) and others.

In Dillingham, supra, this Court held that even when the defendant has not shown actual prejudice, the time elapsing between arrest and indictment must be considered in appraising the alleged denial of a speedy trial.

The Court in Dillingham, supra, referring to United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971),

"The Court held that 'On its face, the protection of the (Sixth) Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.' (Emphasis supplied) 404 U.S. at 313, 30 L. Ed. 2d 468, 92 S. Ct. 455. In contrast, the Government constituted petitioner (Dillingham) an 'accused' when it arrested him and thereby commenced its prosecution of him." (46 L. Ed. 2d at 207)

Neither of the Defendants were "arrested" in connection with the offenses made the subject of the indictment before the same was filed. Defendant Largent, however, was a federal prisoner at the time at Leavenworth (Tr. 558, 559, 640) and had previously been arrested by Federal agents in Detroit in May, 1971 (Tr. 640). The Defendants do not fall within the express holdings of either Marion or Dillingham, supra; however, it is submitted that they do fall within a

a spirit or a purpose underlying the Sixth Amendment guarantee. It is obvious from the FBI interview sheets, the tapes, the eyewitness account of Sterling Heights Police Chief Foltz and the facts set forth in the Concise Statement of the Case, that the Defendants were "accused," though not formally, at least by the end of January, 1970, when the case had been as fully developed as it was thereafter.

Though, seemingly, there is no duty of the Government to discover and investigate to determine the claimed involvement of, and the identity of criminal participants, in terms of activating Sixth Amendment protections, it would seem that those protections should be activated, though no formal arrests have been made, where the Government's investigative case is so complete that it cannot be said that anything thereafter coming to its knowledge has any but surface improvement; and if, as here, what was factually developed by investigation

as of the FBI interviews of Berryman on January 27 and 29, 1970, together with all other investigation completed by that time, is substantially all that was developed at trial (B Tr. 70).

The Sixth Amendment's purpose must be reviewed from both ends of the tunnel; to have a speedy trial may not require speedy investigation of the crime and its participants in determining their complicity or lack of it; but once that investigation has been so completed that it cannot be said that anything thereafter is anything more than window dressing, there should be recognized a duty on the part of the Government, in terms of activation of the speedy trial duty, to make its presentation to a grand jury. Thus, the Government is viewed as one of the two participants, and must justify its refusal to prosecute under such facts. A contrary position would enable the Government, at will,

in its sole and uncontrolled discretion, to selectively hold what it conceived to be a winning hand, to play at its whim at a time selected by it for presentment to a grand jury.

In MacDonald, supra, Defendant's arrest preceded his indictment by about four and one-half years. Defendant's arrest was by United States Army personnel in connection with the murder of his wife and two daughters on an Army base. The Army formally charged the Defendant with the murders, an Article 32 (of the Uniform Code of Military Justice) proceeding was conducted, 56 witnesses testified (of which 27 were called by the Army), and at the conclusion of same, an Army General, upon the recommendation of an Army Colonel, dismissed the charges.

Approximately eight months after the charges were made, Defendant was honorably discharged from the Army. Subsequently, the Defendant was indicted.

The Court stated, as follows:

> "We conclude that the delay of four and one-half years, dating from the Army's accusation and detention of MacDonald in May, 1970 to his indictment in January, 1975, even when allowances are made for several intervals, violates the right to a speedy trial guaranteed by the Sixth Amendment. We therefore reverse and order dismissal with prejudice." (p. 2)

District Judge Craven, dissenting, stated in part, as follows:

> "My brothers hold that the Sixth Amendment's guarantee of the right to a speedy trial as interpreted by the Supreme Court in Marion, Baker, (sic), and Dillingham, is triggered by the Army proceedings. I think not and respectfully dissent."

The three cases referred to by Judge Craven in the above quote are Marion and Dillingham, supra, and Barker v. Wingo, 407 US 514 (1972).

In arriving at its decision in MacDonald, the Court considered the conduct of the Government. The Court pointed out that:

> "The government has not provided any satisfactory explanation for this two-year hiatus. ***[N]o significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later. Moreover, the United States Attorney was familiar enough with the case to recommend prosecution and specify his need for an additional attorney in the summer or fall of 1973. *** The leisurely pace from June 1972 until the indictment was returned in January 1975 appears to have been primarily fro the government's convenience. ***(p. 22) Whether one (p. 23) atributes the delay from mid-1972, when the CID recommended prosecution until the indictment was returned in January 1975 to indifference, negligence, or ineptitude, it must be weighed against the government. Barker v. Wingo, 407 U.S. at 514; Dickey v. Florida, 398 U.S. 30 (1970)"

The delay on the part of the Government in the instant case, from February of 1970 to November of 1973 (a delay of three years and nine months) was unexplained, and this despite the Government's being called upon to do so in connection with the motions to dismiss made below.

The lower court, in its opinion of July 2, 1974, denying the motions to dismiss stated, in material part, as follows:

> "Thus, the motion to dismiss the indictment for reason of delay is denied, for defendant has not shown any evidence to indicate that there was an intentional delay by the government, or even that there has been any bad faith in such a delay. Additionally, there is no evidence at this point to show actual prejudice. ***" (p. 8)

If, as defendants contend, the speedy trial protection of the Sixth Amedment should be activated at the time of the Government's discovery of such case as it eventually presents to a grand jury, and it has reason to know at the time of its discovery that what it has discovered is in effect all it will ever be able to present

to such grand jury, then there ought to be no reason for requiring defendants to make an actual showing of prejudice.

In the instant case, it is submitted that defendants were substantially handicapped, and prejudicied, as indicated, in part, by their responses to questioning and the absence of witnesses when measured against the trial proceedings.

Instances of expressed memory difficulty on the part of each Defendant were many and varied. These appear throughout the testimony of each Defendant and, in the case of the Defendant Largent, appear especially at (Tr. 568, 582, 613, 615, 616, 619, 625, 630, 663, 687, 689, 729, 735 and 739); in the case of Defendant Higdon, at (Tr. 831, 858). They indicate a profound difficulty in meeting the charges.

Due to various adjournments, none of which was sought by defense counsel prior to the commencement of trial, the trial did not

commence until October 23, 1975, or nearly six years after the last of the claimed offenses, and almost five years after the Government was possessed of all it knew or should have known concerning the claimed case against the Defendants.

Defendants Fifth Amendment and due process right to a speedy trial were cleary violated.

The motions filed by Defendants seeking the dismissal by reason of the undue and unexplained delay on the part of the Government in presenting its case to the Grand Jury were denied by the lower court on July 2, 1974.

Prior to trial, Defendants unsuccessfully moved for dismissal with prejudice of the indictment, claiming the unconstitutionality of Sections 891 and 894 of Title 18, United States Code, to the extent that those sections purport to proscribe, as federally criminal, the use of extortionate means to attempt to collect

an unenforceable obligation concerning which there was a claimed extension, but not an "extortionate" extension, of credit.

An F.B.I. interview sheet of Berryman dated Februray 10, 1970, pertaining to two interviews by special agents of the F.B.I. though not made a trial exhibit, conclusively establishes that Berryman, as of the time of his January 27 and 29 interviews by Special Agents Harold D. Smith and Ronald E. West provided the agents with sufficient information (Tr. 70), which, if believed by them, together with other information in the possession of the F.B.I., including Sterling Heights and Southfield Police reports and the complained of tapes of the four conversations between Michael, on the one hand, and Largent, Higdon and Berryman on theother hand, and together with the known meeting between Michael and Berryman and Sterling Police Chief Foltz at the King's Arms Restaurant or Bar, to present a case to a grand jury.

II. THE COURT OF APPEALS ERRED IN FINDING CONSTITUTIONALLY VALID SECTIONS 891 AND 894 OF TITLE 18, UNITED STATES CODE, UPON WHICH THE INDICTMENT IS BASED, AS APPLIED TO NON-EXTORTIONATE CREDIT TRANSACTIONS.

The Court of Appeals has decided an important question of federal law which has not been, but should be decided by this Court.

There can be no doubt of the power of Congress to prescribe extortionate extensions of credit, more commonly known and referred to as "loan-sharking". United States v. Perez, 402 U.S. 146.

The Defendants were not charged with making "extortionate" extensions of credit. All witnesses verified that no interest was charged on the gambling debt and there is no proof that any threats were made at the time of the bets to use violence in collecting them.

> "An extortionate extension of credit (Underline ours) is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that

> delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person." (18 USC §891[6])

The use of extortionate means to attempt to collect an extension of credit (in this case, a gambling debt) does not have the requisite impact on interstate commerce unless, on a case by case basis, depending upon the particular facts alleged and shown, it is shown to have such impact or effect.

Gambling itself is treated in this manner. In U.S. v. Bally Manufactuing Corporation, 345 F Supp 410, 426 (USDC - ED La, 1972) the Court stated, as follows:

> "***However, to have the requisite effect on interstate commerce and to come within the ambit of section 1955, the gambling business must be of a certain size and in substantially continuous operation. If these criteria are satisfied then it does not matter that the particular business is purely intrastate in its operation because by statutory definition, based on congressional inquiry, such a business as part of a class of activities involves a per se effect upon or use

of interstate commerce or its facilities."

No such minimum requirements to establish "a per se effect upon or use of interstate commerce or its facilities" are set forth in 18 USC § 894. Any and all "extortionate means" to attempt to collect any and all "extensions of credits", no matter their source, the nature of the participants in the use of extortionate means, the parties to the extension of credit, or the effect or lack of effect on interstate commerce, are proscribed by 18 USC § 894 and made federally criminal thereby. State extortion statutes need no longer exist for they are effectively supplanted, at the whim of each federal prosecutor, by 18 USC § 894.

While the Defendants concede the constitutionality of 18 USC § 894 as applied to an obligation which otherwise would be dischargeable in bankruptch on the theory that otherwise the purpose of the bankruptch laws would be frustrated, a gambling debt in Michigan is not enforcible by lawful means. It is,

therefore, not necessary for a debtor to list his gambling debt in his petition in bankruptcy. Since he need not list it, the purpose of the bankruptcy laws can not be "frustrated" in any sense of the word. There can be no bankruptcy basis for the operation of Sections 891 and 894 as applied to the use of extortionate means to collect, or attempt to collect a gambling debt here.

In United States v. Tomasetta, 429 F2d 978 (CA 1, 1970), defendant's conviction of using extortionate means to collect extensions of credit in violation of Section 894 of Title 18, United States Code, was reversed and remanded with instructions to dismiss the indictment (by reason of the vagueness of the indictment.) In reversing defendant's conviction, however, the Court further stated, as follows, at page 981:

> "In fairness to the parties, we feel that in dismissing the indictment, which presumably will lead to the government's seeking a new one, we should make reference to the fact that the court is not presently of one mind

on the question whether, had the indictment been sufficient, we would nevertheless have been obliged to sustain the defendant's motion for acquittal. The constitutionality of the statute is a subject of serious controversy. (citations omitted) (Parenthesis ours) By failing to limit itself to transactions involving exhorbitant interest charges, thereby probably justifying an assumption that the transaction involves organized crime and consequently affects interstate commerce, it reaches conduct which has no apparent effect on interstate commerce. (Underline ours) On the other hand if it should be decided that the statute is unconstitutional on in that it is overbroad, it is debatable whether a defendant who allegedly charged an exorbitant interest rate has standing to complain. (Citations omitted) (Parenthesis ours) Since we are not in accord, we see no present need to resolve these difficult questions.***"

There is nothing about a gambling debt, per se, which affords a basis for Congress to properly determine, as it did in the case of loan-sharking, that there is an effect on interstate commerce. Congress might have limited prosecution of the use of extortionate means to collect, or attempt to collect a gambling debt to cases where there is shown to be an effect

upon interstate commerce can not be doubted.

Congress did not do so.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTIONS TO EXCLUDE UNSUPPORTED TESTIMONY THAT DEFENDANTS HAD ENGAGED IN SIMILAR BUT SEPARATE ACTS OF CRIMINAL EXTORTION.

The general rule of the inadmissibility of other offenses than the offense charged in an indictment was set forth in Boyd v. United States, 35 LEd 1077 (1892). In Boyd, supra, defendant's conviction of murder arising out of an attempt to rob was reversed. During his trial, defendant objected to testimony that he had participated in other robberies. The Court decided that there was no casual connection or relationship between the robberies and the offense of which he was convicted. The same effect is United States v. Magee, 261 F2d 609, 612 (CA 7, 1958), the Court stating, as follows:

> "We are convinced that the crimes commiteed in Illinois had no connection (Underline ours) with the South Bend holdup and that evidence of the former was improperly (and incidentally, needlessly) admitted by the district court.***"

What "connection" did the other claimed collections on behalf of the Defendant Largent have with the collection charged in the indictment? It is submitted that they had none. The case would be different if Largent had testified (without any evidence having been elicited on direct examination concerning other claimed collections) that he had hired Berryman to make lawful and peaceable collections from others; that he had never instructed him to make what would be an extortionate collection and claimed no knowledge of Berryman's extortionate activities. In this situation, evidence of other extortionate collections including testimony from the extortion victims, would be admissible to prove Largent's intent in hiring Berryman. And, evidence of the absence of "mistake" on Largent's part would be admissible only if "mistake" were suggested by Largent in his testimony. Largent's testimony

was clear. There was no mistake about it. He testified that he did not hire Berryman to collect any money from Michael.

Berryman's testimony concerning other claimed collections was admissible only to rebut a defense claim, or testimony supporting a claim, and there was none, concerning contrary intent (e.g., the hiring of Berryman to peaceably collect), or mistake (e.g., a claim by Largent that Berryman was "mistaken" as to Largent's instructions, a claim which was never made) or to show a scheme or design or plan. The trial court based its decision on "mistake" and "scheme". There was nothing about Berryman's collection method to qualify it as rising to the dignity of a "scheme". It was plain, out and out, violence and the threat of it. Indeed, if it was a "scheme", there was nothing to distinguish it from the approach that might have been employed by any other common street criminal. This is manifestly not a case where a peculiar "scheme" was employed

by Berryman, or by Largent, or by Largent in conjunction with Berryman.

By way of contrast, United States v Clay, 495 F2d 700, 705 - 707 (CA 7, 1974) furnishes an example of evidence properly admissible to show motive or intent and which was inextricably linked to proof of the commission of the offense charged.

There is absent here, but present in Clay, supra, a question of intent. Here, there is no ambiguity about the fact of an extortionate collection from William R. Michael. And, Largent and Higdon either hired Berryman or they did not. The unsupported testimony of Berryman that he arranged a 50 - 50 split on collections from others served only to extremely prejudice the jury into believing the greater likelihood that these defendants hired Berryman to do the extortionate collection of Michael, and this on the impermissible theory that if a person commits one crime, expecially the same

kind of crime, then he is all the more likely to have committed the crime charged.

The other collections were legally irrelevant to establish Berryman's agency; they were legally irrelevant in aid of his own credibility.

Finally, evidence as to the other claimed, and uncharged collections, had nothing to do with the identity of either Berryman or Largent, had nothing to do with proving whether or not Largent had guilty knowledge in terms of the requirement that he "knowlingly" allegedly "aided", etc. in the extortion of Michael; there was nothing ambiguous about Berryman's intent, with respect to the manner of collecting from Michael (and Largent denied that he hired him to handle the collection of Michael);and there was no question of motive that could be aided, impermissibly, by the admission into evidence of Berryman's testimony regarding uncharged extortions.

The other claimed extortions, not charged in the indictment, showed no facts relating to the charged conspiracy or to any of the substantive offenses. The jury demonstrated by its failure to reach agreement on the Conspiracy Count that the Government's case concerning it was weak at best, from the standpoint of the jury's assessment of Berryman's credibility. There is not present in these trial proceedings the ability to say with moral certainty that the proofs were overwhelming, or even strong, in support of the convictions secured and attacked. It certainly cannot be said that the introduction of these other offenses (collections and attempts to collect) was mere harmless error. Who can say what effect Berryman's testimony concerning those other offenses had upon the mind of even a single juror?

IV. THE COURT OF APPEALS ERRED IN NOT REVERSING BECAUSE TELEPHONIC CONVERSATIONS INVOLVING THE DEFENDANTS WERE INTERCEPTED AND RECORDED WITHOUT THEIR CONSENT AND EVIDENCE OF THESE CONVERSATIONS SHOULD HAVE BEEN SUPPRESSED AS DEFENDANTS MOVED.

Richard Beale of the Southfield Police Department testified that he recorded telephone conversations allegedly involving the Complainant Michael, and the Defendants Largent and Higdon. (T 48 et seq.)

Conversations were recorded with the consent of Michael but without the consent of either Defendant. The record does not reveal that a warrant was issued permitting these telephone interceptions. The Defendants objected to the introduction of evidence regarding these conversations, which eventually became the Government's Exhibits 1 & 1-A, but that this objection was denied.

The defense maintained that consent for the electronic eavesdropping was required, despite extant Federal and United States Supreme Court authority, and cited two recent Michigan

cases, People v. Beavers, 393 Mich 554 (1975) and People v. Plamondon, 64 Mich App 413 (1975), which precluded warrantless eavesdropping without consent.

Although these cases are clearly not binding on this Court and although existing Federal authority permits the electronic eavesdropping herein, Defendants respectfully maintain that the rule in these cases should be modified to preclude electronic eavesdropping of the type herein, without consent.

Pursuant to Katz v. United States, 389 U S 347; 88 S Ct 507; 19 L Ed 2d (1967), Defendants Largent and Higdon had a justifiable expectation of privacy when they were telephoned by Richard Michael. This privacy interest was breached when Michael permitted their conversations to be recorded by the local police. Consequently, as discussed in the Plamondon and Beavers cases, the consent of Defendants Largent and Higdon should have been a prerequisite to an electronic interception of the telephone

communications.

Michael made the calls to Defendants at the request of the police and was, therefore, a government agent. Several cases from this Court usually cited on this question are distinguishable from, and indeed support, appellants contention here. United States v. Hoffa, 385 U.S. 293 and Lopez v. United States, 373 U.S. 427, both involved entree by government agents into Defendant's quarters by invitation of Defendant. It would be absurd to imply consent by the instant Defendants to the intrusion into their homes.

V. THE COURT OF APPEALS ERRED IN NOT REVERSING THE CONDUCT OF THE GOVERNMENT TRIAL COUNSEL IN ATTEMPTING TO SHOW THAT DEFENDANT HIGDON ATTEMPTED TO ARRANGE THE HANGING OF A PROSECUTION WITNESS AND IN ASKING DEFENDANT HIGDON IF HE HAD HEARD A PROSECUTION WITNESS STATE THAT SHE HAD IDENTIFIED HIGDON'S PHOTOGRAPH WHEN, IN FACT, NO SUCH TESTIMONY EXISTED.

A significant departure from the accepted and usual course of judicial proceedings occurred during trial and it requires the exercise of this Court's power of supervision.

The Defendants were charged in an indictment with crimes ranging from Conspiracy to Extortion, yet unexpectedly Defendant Higdon found himself on trial for an attempted hanging of the Government's star witness, Phillip Wayne Berryman. To state that the defense was surprised is obvious. To state that the Defendants were denied a fair trial becomes apparent from examination of the record which reveals that the United States Attorney had no basis for charging the Defendants with Attempted Murder.

During the cross-examination of Michael Wilcox, a defense witness and friend of Defendant Higdon, the United States Attorney showed that Wilcox knew the prosecution witness Berryman when they were both at the Ionia State Reformatory (Tr. 805) and that he, Wilcox, knew "pretty much what was taking place among the prisoners." (Tr. 805-805) The United States Attorney then conferred with the case agent and subsequently asked Wilcox about a hanging that allegedly occurred while Berryman was at Ionia. The following colloquy transpired. (Tr. 806):

> "Q. While you were at Ionia at the same time Berryman was there, did you come to know about an individual who had been found hung in the cell?
>
> "A. I don't know if that was true. The guy was hung.
>
> "Q. Look. Was somebody found in your cell hung?
>
> "A. Yes, there was.
>
> "Q. You are familiar with the incident?
>
> "Mr. Webb: Your Honor, I don't know what he is getting into here. I don't know

> "whether it is anything to do with this lawsuit or his witness or what.
>
> "Mr. Newcomer: I will make an offer of proof."

The Court then excused the jury, and the Special Attorney for the Justice Department stated that the hanging was a "very mysterious unsolved type of incident at Ionia (Tr. 807) and that Berryman believed that he was the person marked for the hanging (Tr. 807-808). The implication of the United States Attorney's remarks was clearly that he was hoping to prove that Higdon was involved in an abortive attempt on the life of the prosecution's star witness, Berryman.

It became immediately apparent, however, that Mr. Newcomer possessed absolutely no basis for this inference, and that his questioning of Wilcox was based on, at best, unsubstantiated conjecture. Mr. Newcomer stated: (Tr. 811):

> "I can't prove Higdon ordered Berryman hung or that Higdon ordered anybody hung."

Judge Churchill responded to the prosecutor's action by stating that he found error even without a defense objection (although it should be noted that the defense did object). He stated:

> "With all of the shenanigans that Mr. Berryman has been involved in, with all of the people that Mr. Berryman has harmed in this world, I could well understand that somebody might want to take revenge on him. That's possible. But to infer it might be Mr. Higdon I think is overreaching and would be highly prejudicial. I am surprised the defendants object because I think they would have a built-in error even without an objection. It would be so prejudicial. I sustain an objection to that further line."

Pursuant to the Court's ruling, defense counsel Webb requested a curative instruction and the following instruction was presented by the Court: (Tr. 813)

> "Members of the Jury, there is some question about something that happened to somebody in Ionia. There is no showing of any possible connection between that and this trial and you should entirely disregard that line of questioning."

The special attorney for the Justice Department continued to elicit prejudicial testimony without foundation when he asked Defendant Higdon during cross-examination if he had heard one of the complainants, Mrs. Michael, testify that she had "picked your photograph out." (Tr. 900)

The defense immediately objected because there was absolutely no proof that Mrs. Michael had ever previously testified that she had picked Defendant Higdon out of the photo lineup. Counsel further stated that he felt it would be impossible to cure this error through a curative instruction (Tr. 900, 901).

The second instance of prosecutorial misconduct was too much for even Judge Churchill. He stated (Tr. 903):

> "You can check the record but it is the first I ever dreamed there was a line-up. I want to say this: I am going to say it right now because I was looking it up this morning. I am thoroughly disgusted with the continuous practice of the Government in this case and in other cases

"recently coming out with things that they ought not to come out with. I thought that business yesterday about the hanging was the most atrocious incident I ever seen in my life in court, just terrible, absolutely unexcusable. It was an inference on an inference on an inference on an inference. I know these things happen from time to time but I have been around this business for a long long time and they have been happening. I have seen more of it in the last few weeks than I have seen in my entire lifetime."

Despite this, Defendants' Motion for a Mistrial was denied (Tr. 915). And, again, a curative instruction was presented to the jury (Tr. 919).

Thus, although the trial Court recognized error on both occasions when the prosecutor paraded unsupported allegations before the jury, Defendants were not afforded a new trial. Defendants respectfully maintain that the error perpetrated by the prosecution was so egregious and malicious, especially on the first occasion, that the only proper remedy is a new trial.

This result is demanded by Berger v. United States, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629, (1935) and Sixth Circuit authority subsequent to that ruling.

In Berger, the trial Court, as here, sustained objections to various questions, insinuations, and misstatements, propounded by the United States Attorney, and presented curative instructions to the jury. This Court ruled, however, that this was insufficient and that a new trial was required. It analyzed the Attorney General's misconduct in terms of his intent, the cumulative effect of his misconduct, the sufficiency of the curative instructions, and the strength of the Government's case. The misconduct herein, will be analyzed within the same framework.

A. THE GOVERNMENT'S ATTORNEY INTENTIONALLY AND MALICIOUSLY INJECTED UNSUPPORTED EVIDENCE TO PREJUDICE DEFENDANTS' CASE.

In stating that it was "the most attrocious incident" he had ever seen in Court (Tr. 903), Judge Churchill summed up what has to be one of the most far-reaching examples of prosecutorial overkill in the annnals of American jurisprudence. Fortunately, there is case law that more than merely condemns the United States Attorney's action in the hanging incident.

In U.S. v. Brown, 519 F. 2d 1368 (6th Cir., 1975), a panel of this Court reviewed a situation wherein the Government questioned a witness about prior alleged bad acts of the Defendant, even though the Government had no basis for alleging that the Defendant had committed prior bad acts. Judge Edwards for the Court, in reversing, stated:

"The District Court acted properly in sustaining the objection to the prosecutor's question about the Dixie Mafia. However, the United States Attorney should have been well aware of the legal irrelevance and prejudicial effect of this question. The code of professional responsibility of the American Bar Association states the matter in this way:

"Appearing in his professional capacity before a tribunal, a lawyer shall not: ... (2) ask any question that he has no reasonable basis to believe is relevant to the case that is intended to degrade a witness or other person..."

> American Bar Association, Code of Professional Responsibility, Disciplinary Rule 7-106 C(2), Page 88 (1959).

"In Berger v. United States, [citations omitted], the Supreme Court stated that the United States Attorney's duty to the public and the defendant obliges him to seek justice rather than convictions. The prosecutor in this case appears to have been preoccupied with seeking the latter rather than the former. His conduct requires reversal of what otherwise would likely have been an untainted conviction."

> 512 F. 2d 805, 807

Pursuant to Brown, Perry, and Berger, supra, the irresponsible and malicious attempt by the United States Attorney to pin a

hanging on Defendant Higdon mandates reversal. As Justice Douglas stated in dissent in Donnelly v. DeChristoforo, 416 U.S. 637, 649, 40 L. Ed. 2d 431, 94 S. Ct. 868 (1974):

> "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."

The incident involving the photo lineup reveals, perhaps, less bad faith, but as discussed, infra, the net effect of the actions of the Special United States Attorney requires that Defendants be afforded a new trial.

B. THE CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT NECESSITATES REVERSAL.

Where prosecutorial misconduct is repeated, the case for reversal is strengthened. In Berger, the Court stated:

> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single incident, but one where such misconduct was pronounced and persistent, the probable cumulative effect upon the jury which cannot be disregarded is inconsequential." [Citations omitted] 295 U.S. 89

The hanging and photo lineup incidents represent back-to-back examples of prosecutorial misconduct. Taken together, they magnify the prejudicial impact on the jury.

C. THE PROSECUTOR'S MISCONDUCT SHOULD NOT BE REGARDED AS HARMLESS ERROR BECAUSE OF, INTER ALIA, THE RELATIVE WEAKNESS OF THE GOVERNMENT'S CASE.

Defendant Largent was found not guilty on Counts III, IV, and V of the Indictment. The jury was unable to reach a verdict on Count I, and found Defendants guilty only on Count II and Count VI after deliberating three days. This is hardly an open and shut case for the Government, and the prejudicial actions of the prosecution can therefore not be regarded as harmless.

In United States v. Calvert, 498 F. 2d 409 (6th Cir., 1974), the Sixth Circuit in a per curiam opinion considered, in reversing a conviction, that the jury had deliberated over twelve hours before finding the Defendant guilty, where the Government had improperly introduced evidence of a Bureau of Identification card where there was no basis for alleging that Defendant had a prior criminal record. The Court stated at 410-411:

> "The Appellee urges that the evidence of Appellant's guilt was so overwhelming that any error with reference to the use of Bureau of Identification card could not have affected Appellant's "substantial rights" and should therefore be disregarded under Rule 52(a), Federal Rules of Criminal Procedure. If, indeed, the evidence was as overwhelming as Appellee would have us believe, the introduction of this improper evidence carrying with it the implication of Appellant's previous difficulties with the law, can only be regarded as overkill on the part of the Government. The jury deliberated a total of twelve hours before returning its verdict, and particularly in that circumstance we cannot conclude the admission of the questioned evidence to be harmless error."

See also, U.S. v. Smith, 403 F. 2d 74, (6th Cir., 1968) and Berger v. United States, supra.

The jury herein was not out twelve hours as in Calvert but was deadlocked for three days. The ultimate verdict was hardly a smashing victory for the Government, and thus the prejudicial actions of the United States Attorney cannot be considered as harmless.

D. THE CURATIVE INSTRUCTIONS DID NOT PREVENT REVERSIBLE ERROR.

An examination of recent Sixth Circuit authority reveals where the United States Attorney introduces improper evidence to the jury, a curative instruction may not be effective, especially where the instruction does not include a strong rebuke of the Government's actions.

Judge Edwards, in Brown, supra, stated:

> "Nor can we hold that the error committed at this trial was cured by judicial admonition. The admonition relied on by the Government on this appeal did not serve to strike (and condemn) the questions of the prosecutor. It only instructed the jury to disregard Witness Centers' denials in answering the suggestive questions." 519 F. 2d 1369, 1370

In Perry, supra, the Court, in the same vein as Judge Churchill, attacked the deliberate injection of inadmissible evidence, but stated that a curative instruction did not erase the prejudice. The Court said at 806:

> "We have stated in other cases our concern about the practice of prosecutors deliberately injecting inadmissible prejudicial evidence into criminal trials and thereby jeopardizing otherwise strong cases. [citations omitted]
>
> "In this case, the prosecutor committed several improprieties that either were not corrected or not susceptible of correction by the District Judge, and combined to affect adversely Appellant's substantial rights." Rule 52(a), Federal Rules of Criminal Procedure

Although Judge Churchill strongly remonstrated the special attorney for the Justice Department outside of the hearing of

the jury, he failed to do so in the presence of the jury. Pursuant to the above authority, the two curative instructions, were therefore ineffectual.

This is especially so because it cannot be assumed, that the jury did not believe the hanging was unrelated to the Defendants, especially after the prosecutor, in the presence of the jury, said that he could make an offer of proof (Tr. 806). When the representative of the Government states to a jury that he can prove that the allegations regarding a hanging are relevant to the lawsuit, a jury tends to believe the Government. As the Court in Berger stated at 88:

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much wieght against the accused when they should properly carry none. . ."

In light of all the factors discussed in this section and those above, it cannot be safely ascertained that the jury disregarded the actions of the United States Attorney. As Judge Churchill intimated, the prejudicial tactics of the Government in this case should not be permitted to go unnoticed and unchecked. A new trial is necessary to vindicate Defendants' rights to a fair trial.

The Court of Appeals made short work of its consideration of this significant issue, in only two short paragraphs at the end of its Opinion of affirmance.

PRAYER FOR RELIEF

For the reasons above stated, Petitioners pray that this Honorable Court issue a Writ of Certiorari in this cause and, after later full presentment, reverse their convictions herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date three (3) copies of the foregoing Petition for Writ of Certiorari were mailed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and one (1) copy of the foregoing Petition for Writ of Certiorari was mailed to counsel for the Government in the Court below at the following address:

John J. Klein
Criminal Division
Appellate Section
Department of Justice
Washington, D.C. 20530

Dated: _____

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Nos. 76-1285 & -1286

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 76-1285

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MILTON J. LARGENT,
Defendant-Appellant.

No. 76-1286

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JONATHON B. HIGDON,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed December 13, 1976.

Before: WEICK, CELEBREZZE and ENGEL, Circuit Judges.

WEICK, Circuit Judge. Appellants Largent and Higdon were convicted by a jury in the District Court on two counts of a six-count indictment charging them with the substantive offenses of aiding, abetting, inducing, and causing the use of extortionate means to collect an extension of credit in violation of 18 U.S.C. §§ 891, 894 and 2. Largent was acquitted on three counts of the indictment charging the commission of other substantive offenses. Both Largent and Higdon were

acquitted on the count charging conspiracy to commit the substantive offenses.

Largent received concurrent sentences of four years on each count, and Higdon three years. Both sentences were subject to immediate parole eligibility provided in 18 U.S.C. § 4208 (a)(2).

In their appeal the principal contentions are that they were denied a speedy trial; that the statutes under which they were indicted were unconstitutional; that the indictment was vague and defective; that the District Court erred in its instructions to the jury and in other rulings; that evidence of defendants' prior similar acts was improperly admitted against them, and in the admission or exclusion of other evidence; and that the attorney for the Government asked improper and prejudicial questions of certain witnesses.

I

Largent and Higdon were partners in a gambling enterprise in Detroit, Michigan. The victims of the extortionate means charged in the indictment were William R. Michael and members of his family. These means were used in efforts to collect a gambling debt owed by Michael to the partners.

Michael became a customer of the partnership in the summer of 1968, and placed bets with them each week on horse races and football games; he would pay his losses once each week. It was not until November, 1968 that Michael lost several large bets on football games and horse races, and was unable to make his weekly payment of losses to the partnership. Michael nevertheless continued to place his bets with the partnership and in early 1969 he owed $15,000 in unpaid losses.

For the next three months appellants were unsuccessful in their repeated telephone calls to collect this large debt from Michael. They then hired Philip Berryman, a known gambling debt collector, to collect the debt from Michael. He (Berryman) had been engaged previously by appellants to collect gambling debts owing to them by other persons. His fee was fifty per cent of whatever he collected, and he was directed to use whatever force was necessary to collect the debt from Michael.

Berryman immediately sought out Michael. Because they did not know Michael's address, Berryman went with Largent to a Detroit funeral home and by trick persuaded a worker there to disclose the address of Michael's son, J. Richard Michael. Soon thereafter Berryman threatened J. Richard Michael, by telephone, with violence unless he supplied the address and telephone number of his father. The son complied.

Having obtained this information, Berryman began to call Michael and his family on the telephone, sometimes as often as six times a day, threatening them with violence unless the gambling debt was paid. Most of these telephone calls were received by Michael's wife Grace, as he was not living at home during part of the time. At one point Berryman and three associates threw a brick and a molotov cocktail through the windows of Michael's home and fired a pistol into his living room. They also drove a vehicle over his front lawn, damaging the landscaping.

With the threats continuing, Michael obtained police help. In the evening of July 22, 1969 Michael and Maurice Foltz, the Sterling Heights Police Chief, met with Berryman at a bar to discuss the debt. Foltz, posing as Michael's friend, told Berryman that he (Foltz) was responsible for part of the debt. Michael paid Berryman two hundred dollars, partial payment on the debt. Berryman then threatened them if the rest was not paid soon.

Without heeding the warning, Michael continued to stall on payment of the debt. Berryman countered with death threats against Michael's family. After forceful pleas from his family, Michael finally in early August, 1969, paid Berryman five

thousand dollars in two twenty-five-hundred-dollar cashier's checks, at a Detroit race track.

Later in the month appellants and Michael made a settlement under which Michael paid Berryman's friend, Geraldine McNeal, forty-eight hundred dollars in a money order. Thus Berryman received five thousand dollars for collecting the ten thousand dollar gambling debt.

II

Appellants contend that they were denied their Sixth Amendment right to a speedy trial because the Government had sufficient information by early 1970 to procure an indictment, but it did not obtain the indictment until late 1973, at which time appellants were arrested.

A similar defense was rejected by the Supreme Court in *United States* v. *Marion*, 404 U.S. 307 (1971). The holding in *Marion* was recently reaffirmed by the Supreme Court in the case of *Dillingham* v. *United States*, 423 U.S. 64 (1975). It is clear that the speedy trial provision of the Sixth Amendment commences to run from the date of the arrest and not from a date when an agent of the Government may have learned that a crime was committed. There was no evidence that the delay was occasioned by any intentional device by the Government to obtain a tactical advantage over the defendants; nor were the defendants able to prove substantial prejudice caused by the delay. *United States* v. *Alred*, 513 F.2d 330 (6th Cir.), *cert. denied*, 423 U.S. 828 (1975).

III

It is next contended that 18 U.S.C. §§ 891 and 894 are unconstitutional because they do not require proof of a nexus between the extortionate means and interstate commerce. It is urged that the extortionate means in the present case involved a purely local intrastate activity.

This contention was rejected in *Perez* v. *United States*, 402 U.S. 146 (1971). The Supreme Court held that Congress, in regulating the class of activities affecting commerce, had the constitutional power to regulate purely local intrastate activities. Thus the constitutionality of Sections 891 and 894 was upheld. *United States* v. *Stephens*, 496 F.2d 527, 528 (6th Cir. 1974), *cert. denied sub nom.*, *Marchesani* v. *United States*, 423 U.S. 861 (1975).

The type of loan is inconsequential so long as "the actual characteristics of the extension of credit, the accrual of a debt, and the manifestation of coercion to collect that extension are sufficiently displayed by the evidence presented." *United States* v. *Andrino*, 501 F.2d 1373, 1377 (9th Cir. 1974).

The evidence in the present case was overwhelming. It was supplied by the defendants' hired enforcer Berryman, who testified for the Government, and also by Michael and by members of his family.

IV

We find no prejudicial error in the court's instructions to the jury, or in its use of the disjunctive instead of conjunctive words.

We are also of the opinion that the court did not err in admitting evidence of prior similar acts of the defendants who hired Berryman to commit the acts. Berryman testified that appellants told him to use whatever force was necessary to collect the debt.

Evidence of prior misconduct is not admissible to prove the character of a person or another crime, but rather is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Fed.R.Evidence 404; *United States* v. *Faulkner*, 538 F.2d 724, 728 (6th Cir. 1976); *United States* v. *Wiley*, 534 F.2d 659, 663 (6th Cir. 1976); *United States* v. *Mahar*, 519 F.2d 1272, 1273 (6th Cir.), *cert. denied sub nom.*, *Harris* v. *United States*,

423 U.S. 1020 (1975); and *United States* v. *Ring*, 513 F.2d 1001, 1004 (6th Cir. 1975). Generally, this evidence must be substantially similar and near in time to the offense charged, must be in issue, and must have more probative value than prejudicial impact. *United States* v. *Ring, supra*, at 1004.

Berryman's testimony about his past collection activities for appellants established the fact that these activities were near in time and were very similar to the activities with which appellants were charged. It tended to show a consistent pattern of conduct over the entire time. Also, the appellants' intent as to the crimes was in issue at the trial. The prejudice of admitting this evidence did not outweigh its probative value for the jury. *United States* v. *Mahar, supra; United States* v. *Ring, supra;* and *United States* v. *Nemeth*, 430 F.2d 704, 705 (6th Cir. 1970).

Under 18 U.S.C. § 894, in a conspiracy charge evidence of prior collections is admissible to show some material facts relating to the conspiracy charged. "It would also be relevant to show that they were continuing along the same line in their collections." *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973). Clearly, the Government could introduce evidence of Berryman's prior collection activities in order to prove the conspiracy charge.

The court gave an appropriate cautionary instruction and did not err in denying appellants' motion for a mistrial.

In our opinion the court did not err in admitting into evidence the tapes of recorded telephone conversations between Michael and Largent, as Michael had consented thereto. *United States* v. *Franks*, 511 F.2d 25, 30, 31 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975), and also *denied sub nom., Britton* v. *United States*, 422 U.S. 1048 (1975); *United States* v. *Stephens*, 496 F.2d 527, 528 (6th Cir. 1974), *cert. denied sub nom., Marchesani* v. *United States*, 423 U.S. 861 (1975).

In our opinion the indictment was not vague. It contained all of the elements of the offenses to sufficiently apprise the defendants of the charge and to provide a basis for a plea of

double jeopardy in any subsequent prosecution. *Russell* v. *United States*, 369 U.S. 749, 763-64 (1962); *United States* v. *Harris*, 523 F.2d 172, 174 (6th Cir. 1975).

We do not find that the District Judge abused his discretion in denying a motion for a bill of particulars and a motion for discovery. The defendants sought the names of all the Government's witnesses. The motion was overbroad. There was no error in denying the motions. *United States* v. *Birmley*, 529 F.2d 103, 108 (6th Cir. 1976) (bill of particulars); *United States* v. *Armes*, 470 F.2d 1353, 1355 (6th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973) (discovery).

In our opinion the District Judge did not commit prejudicial error in denying motions for mistrial for alleged prosecutorial misconduct in asking questions to which objections were sustained and appropriate instructions were given.

At most, any error was harmless beyond a reasonable doubt in view of the overwhelming evidence offered at the trial and the cautionary instructions given by the District Court. *Chapman* v. *California*, 386 U.S. 18, 24 (1967); Rule 52(a) Fed. R.Crim.P.

Other errors complained of do not merit discussion.

The judgments of conviction are therefore affirmed.